(10)

No. 96-663

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MARVIN KLEHR and MARY KLEHR,
Petitioners,

v.

A.O. SMITH CORPORATION and
A.O. SMITH HARVESTORE PRODUCTS, INC.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION, THE MANUFACTURERS ALLIANCE, AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does the four-year limitations period applicable to civil RICO claims preclude claims filed more than four years after a plaintiff has been injured but within four years of the last predicate act committed as part of an alleged pattern of racketeering activity?

2. Is the four-year civil RICO limitations period restarted by the commission of predicate acts where those acts do not inflict additional injury on the plaintiff, above and beyond injuries inflicted by other predicate acts committed prior to commencement of the limitations period?

3. Where Petitioners waited 13 years from the date of their injury before filing suit, should the statute of limitations be tolled throughout that period based on conduct alleged to have been engaged in by Respondents?

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting civil justice reform, including tort reform. To that end, WLF has appeared before this Court as well as other federal and state courts to argue against overly expansive theories of tort liability, excessive punitive damages, and imposition of unwarranted attorney fee awards. *See, e.g., BMW of North*

America, Inc. v. Gore, 116 S. Ct. 1589 (1996); *City of Burlington v. Dague*, 505 U.S. 557 (1992). In particular, WLF has worked to avoid overly expansive interpretations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.* *See, e.g., H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989).

The Manufacturers Alliance is a non-profit research organization supported by more than 500 manufacturing companies from a broad range of industries. Its members range in size from relatively small, single-product manufacturers with annual sales revenues in the $30 million to $100 million range to very large, highly diversified manufacturers with annual sales revenues exceeding $1 billion. Its mission is to assist its members in improving productivity by stimulating investment in technology and by encouraging innovations, thereby enhancing its members' worldwide competitiveness.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned by the increasing invocation of RICO by civil litigants engaged in seemingly run-of-the-mill commercial disputes. As the Court itself recognized in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the civil RICO statute "is evolving into something quite different from the original conception of its enactors." *Sedima*, 473 U.S. at 500. While Congress adopted RICO as a tool to be used in fighting organized crime, civil RICO is now invoked primarily in "everyday fraud cases brought

against respected and legitimate enterprises." *Id.* at 499. *Amici* wish to ensure that the seemingly endless expansion of civil RICO claims does not engulf legal principles underlying statutes of limitations.

Amici submit this brief in support of Respondents with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate by reference the Statement of the Case in Respondents' brief.

In brief, Petitioners Marvin and Mary Klehr operate a dairy farm in Minnesota. In 1974, they purchased a Harvestore silo manufactured and marketed by Respondent A.O. Smith Harvestore Products, Inc. ("AOSHPI"). This suit concerns several representations made by AOSHPI to Petitioner Marvin Klehr ("Klehr") in connection with the sale. According to Petitioners, AOSHPI stated that due to the Harvestore silo's "oxygen limiting" feature, problems associated with moldy or spoiled feed would be eliminated. AOSHPI stated that the new silo would eliminate the need to provide protein supplements to the cows, improve the health of the herd, increase milk production by three to five pounds of milk per day, and result in increased profitability.

Petitioners' experience with the Harvestore silo was disappointing. Beginning in 1976, Klehr observed chunks of mold in the feed on an annual basis. In 1982, mold and spoilage was particularly severe; Klehr called in agents for AOSHPI, who worked on the silo and claimed to have

fixed the problem. Klehr noticed increased health problems with his herd following installation of the new silo, and the herd experienced significant breeding and reproduction problems. Petition Appendix ("P.A.") at B-5, B-6. Moreover, despite the new silo, Klehr was never able to eliminate the need for protein supplements. P.A. B-7.

Throughout the period, AOSHPI continued to insist that its Harvestore silos were well designed. Petitioners state that they received from AOSHPI 20 pieces of advertising before the purchase and 38 pieces of advertising after the purchase, all attesting to the effectiveness of the Harvestore design. P.A. B-9. Petitioners contend that AOSHPI's claims were fraudulent -- AOSHPI knew that the Harvestore silo design was defective and was deliberately concealing those defects from its customers. P.A. B-8, B-9.

In April 1991, 17 years after purchasing the silo, Klehr for the first time ever looked inside the silo while feed was still being stored in it. P.A. A-6. He observed large amounts of mold. P.A. B-9. Klehr claims that he then realized for the first time that he had been feeding his cows moldy feed for one and one-half decades, and that the spoiled feed had caused his herd significant health problems. *Id.* Only then did Klehr do a careful check of his Dairy Herd Improvement Association records, and he realized for the first time that installation of the Harvestore silo had not led to the promised increased milk production and had not resulted in increased profitability. P.A. B-7, B-8.

On August 27, 1993, Petitioners filed suit against AOSHPI and Petitioner A.O. Smith Corp. (AOSHPI's parent corporation) in connection with the Harvestore silo purchase. Petitioners alleged several state-law causes of

action (including common law fraud), as well as RICO violations. On January 6, 1995, the U.S. District Court for the District of Minnesota entered summary judgment for Respondents, on the ground that Petitioners' claims were time-barred. P.A. B-1 to B-20. The district court held that Petitioners' RICO claims accrued when they "discover[ed], or reasonably should have discovered, both the existence and source of his injury and that the injury [wa]s part of a pattern." P.A. B-16 - B-17. The court held that Petitioners should have made those discoveries soon after they began noticing mold in their feed and experiencing difficulties with their herd. *Id.* Since more than four years elapsed from that date until suit was filed, the court held that the RICO claims were time-barred under the four-year limitations period established by *Agency Holding Corp. v. Malley-Duff Assocs., Inc.*, 483 U.S. 143 (1987). *Id.* The court held that any injuries suffered by Petitioners during the four years prior to filing suit did not give rise to a new RICO claim, because any such injuries were not "independent and distinct" from Petitioners' earlier injuries. *Id.* at B-18. The court also declined to invoke the doctrine of fraudulent concealment to toll the limitations period, because Respondents "did not conceal the facts constituting the cause of action." *Id.* at B-19 n.5.

On June 6, 1996, the U.S. Court of Appeals for the Eighth Circuit affirmed. P.A. A-1 to A-17. The appeals court applied the same accrual rule as was used by the district court: a RICO claim accrues "as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern." P.A. A-14. Using that rule, the appeals court determined that Petitioners' RICO claims accrued in the mid-1970s and thus were time-barred. P.A. A-15. The appeals court also held that Petitioners' failure

to act with "due diligence" precluded application of "equitable tolling principles" (P.A. A-17 n.11), and that none of Petitioners' alleged post-1989 injuries were sufficiently independent of his earlier injuries to permit restarting the limitations clock under the "separate accrual rule." P.A. A-16 - A-17.

This Court granted a writ of certiorari to consider when a civil RICO claim accrues for statute of limitations purposes, and whether the four-year civil RICO limitations period should have been tolled in this case based on Respondents' alleged active concealment of their fraud.

SUMMARY OF ARGUMENT

In fashioning an accrual rule for civil RICO causes of actions, the Court should follow the accrual rule normally applied in federal actions: a civil RICO cause of action accrues when a defendant has violated the substantive provisions of RICO (18 U.S.C. § 1962) and the plaintiffs have discovered (or should have discovered, through due diligence) both the existence and cause of their injuries. There is no basis for further delaying accrual of a civil RICO action until the plaintiff has discovered, or should have discovered, that the defendants' conduct is part of a "pattern of racketeering activity." Once a plaintiff knows that he has been injured and how the injury was caused, he has been put on notice that he may have legal recourse against those who caused the injury. At that point, it is incumbent on a plaintiff not to sleep on his rights but rather to seek diligently to discover precisely what those rights are.

In any event, regardless whether the Court rules that accrual is delayed until the plaintiff discovers the pattern of

racketeering activity, Petitioners' claims are time-barred. They were aware of their injuries and the source of injuries as soon as they were incurred. Given Petitioners' knowledge that the silo was not performing as well as Respondents had promised and that Respondents' glowing reports regarding the success of Harvestore silos were at odds with Petitioners' experience, Petitioners very quickly were on notice that those reports were false, possibly intentionally so.

Only under the Third Circuit's "last predicate act" accrual rule was Petitioners' suit even arguably timely filed. But that rule has little to recommend it, in large measure because it produces limitations periods far longer than anything contemplated by the Court in *Agency Holding*.

Nor may Petitioners properly invoke the "separate accrual" rule in order to revive portions of their claim. The separate accrual rule holds that a new claim accrues, triggering a new four-year limitations period, each time a plaintiff discovers, or should have discovered, a new injury caused by the predicate RICO violations. But the injuries allegedly suffered by Petitioners in the four years before they filed suit were directly attributable to acts committed by Respondents outside the limitations period. The separate accrual rule is unavailable to Petitioners in the absence of evidence that their "new" injury is distinct from their time-barred injuries.

Finally, conduct allegedly engaged in by Respondents is insufficient to permit Petitioners to invoke equitable estoppel and thereby toll the running of the statute of limitations. Petitioners allege that Respondents continued to engage in mail fraud long after the sale of the Harve-

store silo to Petitioners, but there is no evidence that such mail fraud in any way impeded Petitioners' ability to investigate their claim. In the absence of such evidence, equitable estoppel is wholly inapplicable to this case.

ARGUMENT

I. THE LIMITATIONS PERIOD ON PETITIONERS' RICO CLAIM BEGAN TO RUN WHEN THEY DISCOVERED THEIR INJURY AND THE ELEMENTS OF THE RICO CLAIM EXISTED

Although the statute creating a civil right of action under RICO (18 U.S.C. § 1964)[1] does not contain an express statute of limitations, the Court held in *Agency Holding* that Congress should be assumed to have intended to impose a limitations period on civil RICO actions and that the most appropriate period was the four-year period established under the Clayton Act (15 U.S.C. § 15a) for civil antitrust actions. *Agency Holding*, 483 U.S. at 150. The reasons articulated in *Agency Holding* for adopting a RICO statute of limitations also counsel in support of adoption of the accrual rules suggested by Respondents.

The Court has explained in *Agency Holding* and elsewhere the important purposes served by statutes of limitations. Statutes of limitations:

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[1] Section 1964(c) provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

> [R]epresent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 109, 117 (1979).

The salutary purposes of statutes of limitations would be undermined, of course, if they were combined with accrual-of-action rules that allowed overly lengthy postponement of the commencement of limitations periods. The Court has stressed, therefore, that accrual rules must be determined with an eye toward the policies underlying the corresponding statute of limitations. *See, e.g., Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) ("Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. . . . In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application.").

Establishing a uniform federal rule of accrual in civil RICO cases seems appropriate in light of the concerns that animated *Agency Holding*. That decision held that adoption

of a uniform federal statute of limitations in civil RICO cases (as opposed to borrowing the most analogous state-law limitations period) was warranted in order "to avoid intolerable 'uncertainty and time-consuming litigation'" and because of "the lack of any satisfactory state-law analogue to RICO." *Agency Holding*, 483 U.S. at 150, 152 (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)). Those concerns are equally applicable to the issue of appropriate accrual rules. Indeed, since (as *Johnson* points out) statutes of limitations and accrual rules are so closely interrelated, it would make little sense to determine accrual rules by resort to state law -- which might not reflect the same balance between plaintiffs' and defendants' rights as the federal statute of limitations established in *Agency Holding*.

In deciding that a four-year statute of limitations should apply to civil RICO actions, the Court in *Agency Holding* gave no indication that it believes that civil RICO plaintiffs are entitled to any special degree of solicitude when it comes to determining whether claims are time-barred. Accordingly, the accrual rule normally applied in federal actions should be applied here: a civil RICO cause of action accrues when a defendant has violated the substantive provisions of RICO (18 U.S.C. § 1962) and the plaintiffs have discovered (or should have discovered, through due diligence) both the existence and cause of their injuries. *See, e.g., Kubrick*, 444 U.S. at 120-22 (accrual of action under Federal Tort Claims Act, 28 U.S.C. § 2401(b)); *Urie v. Thompson*, 337 U.S. 163, 169-70

(1949)(accrual of action under Federal Employers Liability Act).[2]

By requiring that a substantive violation of RICO exist before the civil RICO statute of limitations begins to run, the Court would fully placate the somewhat fanciful concern of Petitioners and their supporting *amici* (*see, e.g.*, Brief of *Amicus Curiae* NASCAT at 6-7) that under the accrual rules devised by some appeals courts, the civil RICO limitations period could expire before an injured party ever had a right to file suit.[3] We term that concern "somewhat fanciful" because we are unaware of any appeals court (in-

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[2] While older tort cases traditionally held that a cause of action accrues as soon as the plaintiff is injured without regard to whether the plaintiff is aware of the injury, the more recent trend (which began with medical malpractice cases and has spread to other areas of the law) is to defer accrual until the plaintiff is aware (or should have been aware) of the injury and its cause. *Kubrick*, 444 U.S. at 120-21 & n.7. In most cases, of course, the plaintiff will become aware of an injury and its cause as soon as it is inflicted. But in some cases -- as when the symptoms of a disease develop over the course of many years -- the plaintiff will have no way of discovering that he has been injured until a considerable time after the injury was incurred. Some civil RICO cases undoubtedly fall into that latter category.

[3] NASCAT's concerns arise from the requirement that a defendant commit two predicate acts before the requisite "pattern of racketeering activity" can be said to exist. 18 U.S.C. § 1961(5). NASCAT argues that if a plaintiff is injured by the defendant's commission of a single predicate act and if the defendant does not commit a second predicate act until more than four years later, then the limitations period would have expired before the plaintiff could establish that the defendant had engaged in a "pattern of racketeering activity." A rule preventing the running of the statute of limitations until a substantive RICO violation exists (*i.e.*, until the defendant has committed two predicate acts and the other substantive RICO requirements have been met) eliminates this concern.

cluding those circuits that have adopted the so-called "injury-discovery" rule) that have held directly that the civil RICO limitations period should begin to run even before a "pattern of racketeering activity" exists. Indeed, a number of appeals courts that have adopted the injury-discovery rule (cause of action accrues as soon as the plaintiff discovers, or should have discovered, his injury) have made clear that a RICO injury cannot be said to exist until such time as the defendant engages in a "pattern of racketeering activity." *See, e.g., Grimmett v. Brown*, 75 F.3d 506, 512 (9th Cir. 1996), *cert. dismissed*, 117 S. Ct. 592 (1997); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992).[4]

A. Awaiting a Plaintiff's Discovery of a Pattern of Racketeering Activity Is Unwarranted

There is no basis for further delaying accrual of a civil RICO cause of action until after the plaintiff has discovered, or should have discovered, that the defendants' conduct is part of a "pattern of racketeering activity." Once a plaintiff knows that he has been injured and how the injury was caused, he has been put on notice that he may have legal recourse against those who caused the injury. The Court has recognized that it is the "general rule" that the statute of limitation begins to run against such a plaintiff without regard to his knowledge of his legal

[4] In any event, even when there is only one injury, the likelihood that a defendant will commit one and only one predicate act is extremely small. For example, Petitioners allege that they received 20 pieces of fraudulent advertising from AOSHPI before purchasing the Harvestore silo and 38 pieces of fraudulent advertising after the purchase. Each such letter constituted a separate predicate act: mail fraud. 18 U.S.C. § 1961(1).

rights against those who caused the injury. *Kubrick*, 444 U.S. 121 n.7. The Court explained:

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the facts of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged.

Id. at 122. A plaintiff who knows that he has been injured at the hands of a defendant is not rendered even more alert to the possibility that he may have legal recourse simply because he learns that the defendant's conduct toward him was part of a pattern of similar conduct engaged in by the defendant. Accordingly, there is no reason not to permit the civil RICO statute of limitations to begin running once the plaintiff knows that he has been injured by the defendant, without regard to his knowledge of a "pattern of racketeering activity."

In the rare case in which a plaintiff is unable, despite due diligence, to learn about the defendant's pattern of racketeering activity, equitable tolling is available to prevent inequity. The Court has made clear that federal statutes of limitations are subject to equitable tolling, which shelters a plaintiff from the statute of limitations in cases in which strict application would be inequitable. *Burnett v.*

Central R.R. Co., 380 U.S. 424, 427 (1965). *See also, Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996)("Equitable tolling is invoked when the prospective plaintiff simply does not have and cannot with due diligence obtain information essential to bringing a suit."); *Phillips v. Heine*, 984 F.2d 489, 491 (D.C. Cir. 1993). Indeed, appeals courts that have held that civil RICO claims accrue without regard to the plaintiffs' knowledge of a pattern of racketeering activity have stated explicitly that equitable tolling may be available in appropriate cases to prevent the expiration of the limitations period against a diligent plaintiff who is unable, despite best efforts, to learn of such a pattern. *See, e.g., Rodriguez v. Banco Central*, 917 F.2d 664, 668 (1st Cir. 1990)(Breyer, J.); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105 (2d Cir. 1988) *cert. denied*, 490 U.S. 1009 (1989).

To say that the statute of limitations is subject to equitable tolling in such cases is, of course, significantly different from holding that the statute does not even begin to run until the plaintiff knows, or should know, of the defendant's pattern of racketeering activity. Equitable tolling "gives the plaintiff extra time only if he needs it. . . . The purposes of the doctrine are fully served if the court extends the time for filing by a reasonable period after the tolling period is ended." *Phillips*, 984 F.2d at 492. Thus, under equitable tolling principles, a diligent plaintiff for whom the four-year civil RICO limitations period has already run would be afforded (at most) a several-month extension to file suit after learning of the pattern of racketeering activity -- not the additional four years permitted under the injury-and-pattern discovery rule employed by the Eighth Circuit in the instant case.

B. The Third Circuit's "Last Predicate Act" Accrual Rule Inappropriately Lengthens the Limitations Period

Since even the Eighth Circuit's liberal accrual rule is of no benefit to Petitioners, they urge the Court to adopt the Third Circuit's "last predicate act" accrual rule. Under that extremely liberal accrual rule, a plaintiff may file a civil RICO action at any time up to four year after the last predicate act committed by the defendant, even if the predicate act causing injury to the plaintiff occurred prior to the limitations period -- provided only that "the predicate act causing injury and the predicate act relied upon are part of the same pattern." *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988). Petitioners' Brief 22-34.

The "last predicate act" rule has little to recommend it. As the First Circuit noted, it can produce extremely long limitation periods. *Rodriguez*, 917 F.2d at 666. A plaintiff can sue to recover for injuries suffered decades earlier if he can demonstrate that the defendant has continued to engage in the same activities, regardless whether the plaintiff has been affected by those later activities. Such a result seems wholly inconsistent with *Agency Holding*'s determination that four years was the most appropriate civil RICO limitations period.

Moreover, the "last predicate act" rule inappropriately focuses on the defendant's conduct rather than on injury suffered by the plaintiff. RICO provides a civil cause of action only to one who has been "injured in his business or property" (18 U.S.C. § 1964(c)) as a result of activities prohibited by the substantive RICO provisions, not to those who might have been injured but were not or to those simply seeking to root out racketeering activity. *Sedima*, 473

U.S. at 496. Accordingly, there can be no justification for reviving an otherwise time-barred civil RICO claim simply because the defendant has committed additional predicate acts, if those acts have no effect on the plaintiff.

In support of the "last predicate act" rule, Petitioners note that the statute of limitations for criminal prosecution of RICO violations runs from the commission of the last predicate act. Petitioners' Brief 25-26. But considerations factored into accrual of criminal statutes of limitations are far different from those affecting accrual in civil cases. Most importantly, since there is no injury requirement in a criminal RICO case, there is no occasion to focus on the date of injury when making accrual determinations. Indeed, civil and criminal RICO cases are sufficiently different that the Court rejected any thought in *Agency Holding* of looking to the five-year criminal RICO statute of limitations when choosing an appropriate statute of limitations for civil RICO cases. *Agency Holding*, 483 U.S. at 155-56.

C. Petitioners' Claims Are Time-Barred Under Any Potentially Appropriate Accrual Rule

Under the appropriate civil RICO accrual rule outlined above, Petitioners' claims are clearly time-barred. Soon after they purchased the Harvestore silo, Petitioners were aware of their injury. They observed chunks of mold in the feed every year after the purchase. They noticed increased health problems with their herd, which also experienced significant breeding and reproduction problems. Although Klehr claims not to have realized until 1991 that the purchase failed to improve productivity and profitability (as Respondents had promised it would), that information was

available to Petitioners from the mid-1970s if they had bothered to examine relevant records.

Petitioners at the same time were also aware (or ought to have been aware) that their injury was attributable to the new silo purchased from Respondents. Klehr has admitted that he was aware that the problems that developed with his herd were symptoms that could be expected among cows eating moldy and spoiled feed. Petitioners were also aware that the specific promises made to them by Respondents (that the new silo would eliminate the need for protein supplements, improve the health of the herd, increase milk production by three to five pounds of milk per day, and result in increased profitability) were not being fulfilled. Given Petitioners' admission that a pattern of racketeering activity was on-going during that same time frame, Petitioners' civil RICO claims accrued sometime in the mid-1970s, and the statute of limitations on those claims began to run. Accordingly, Petitioners' suit (not filed until August 27, 1993) was properly dismissed as time-barred.

Petitioners have not suggested that they were entitled to equitable tolling in order to discover facts necessary to maintain their RICO claim. Nor would any such suggestion be justified. For example, the letters that Petitioners claim to have received repeatedly from Respondents (which allegedly included intentional misrepresentations) provided Petitioners with all the evidence they needed in order to establish a "pattern of racketeering activity." While Petitioners might not have known initially that Respondents' misrepresentations in those letters were intentional, they certainly were put on notice of that possibility when Respondents' letters continued to speak glowingly about Harvestore silos in the face of Petitioners' unhappy experience with their silo. Most importantly, any equitable tol-

ling would only operate to permit Petitioners to file suit during the brief period following their April 1991 "discovery" of Respondents' fraud. Since Petitioners waited more than two additional years before filing suit, equitable tolling may not be invoked to avoid application of the statute of limitations.

Even under the Eighth Circuit's injury-and-pattern accrual rule, the RICO claim is still time-barred. Under that rule, the statute of limitations would not begin to run until, *inter alia,* Petitioners knew (or should have known) that the Respondents were engaged in a pattern of racketeering activity. But, assuming that Respondents' letters contained intentional misrepresentations, Petitioners knew (based on the many letters they received) that Respondents were engaged in a "pattern of racketeering." As noted above, at the very least Petitioners were on notice that the false promises made to them by Respondents were intentionally false.

In sum, the lower courts correctly determined that, applying appropriate accrual rules to Petitioners' civil RICO claims, those claims were time-barred.

II. PETITIONERS MAY NOT PROPERLY INVOKE THE SEPARATE ACCRUAL RULE IN ORDER TO REVIVE PORTIONS OF THEIR CLAIMS

That claims based on earlier injuries resulting from a pattern of racketeering activity may be time-barred does not prevent a plaintiff from recovering under RICO for later injuries resulting from the same pattern. All appeals courts that have addressed the issue have recognized such a "separate accrual rule," which permits the assertion of later-arising claims. *See, e.g., Bingham v. Zolt,* 66 F.3d

553, 559 (2d Cir. 1995)("we recognize a 'separate accrual' rule under which a new claim accrues, triggering a new four-year limitations period, each time plaintiff discovers, or should have discovered, a new injury caused by the predicate RICO violations"); *State Farm Mutual Automobile Ins. Co. v. Ammann,* 828 F.2d 4, 5 (9th Cir. 1987)(Kennedy, J., concurring)("a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and other acts were committed outside the limitations period").

The separate accrual rule is of no benefit to Petitioners in this case, however. The principal injury they claim to have suffered as a result of Respondents' pattern of racketeering activities is economic loss occasioned by their use of a defective silo. Petitioners contend that they continued to suffer those losses over a period of many years for so long as they used the Harvestore silo. Petitioners contend that Respondents engaged in predicate acts (mail fraud) during the four years before suit was filed, in that Respondents continued to send material to Petitioners extolling the benefits of Harvestore silos. But Petitioners can point to no injury flowing from these later predicate acts that was distinct in any way from the injury they were already suffering as a result of their continued use of the silo. The courts below correctly determined that when the injuries relied on by a civil RICO plaintiff "are all of the same type, flow from the same source, and are part of one cognizable pattern of conduct," the plaintiff may not rely on the "separate accrual" rule to revive their claims. P.A. A-16.

The Eighth Circuit's ruling in this regard is consistent with all other federal appeals courts that have addressed the issue. In a closely analogous case, the Second Circuit declined to apply the RICO separate accrual rule to con-

tinuing injuries allegedly suffered by a purchaser of electrical generators that did not perform as well as promised. *Long Island Lighting Co. v. Imo Indus., Inc.*, 6 F.3d 876, 887 (2d Cir. 1993). Even though the purchaser suffered injuries within the limitations period due to its decision to continue making use of the defective equipment, those injuries did not constitute a new RICO cause of action because they were not independent of the original, time-barred injury. The Second Circuit explained that since the extent of the injuries was ascertainable at the time the injuries were first discovered or discoverable, they could have been recovered as damages in an earlier RICO action and thus were barred. *Id.*

Nor does it matter that Petitioners allege that Respondent continued to commit predicate acts during the four years prior to suit being filed, so long as any injuries alleged to have flowed from those later predicate acts were not in excess of the damages Petitioners could have recovered in an earlier RICO action. A defendants' continuation of a course of conduct does not extend a limitations period where the damages arising from such continuation are identical to the damages arising from the earlier, time-barred conduct. Thus, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), the Court held that a claim for lost profits under the antitrust laws may be time-barred if it could have been asserted in an earlier action for lost future profits -- even though the antitrust conspiracy has continued. *Zenith Radio*, 401 U.S. at 339. Similarly, in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Court held that the statute of limitations for a national origin discrimination claim under 42 U.S.C. § 1981 began to run from the date on which a college determined that it would not grant tenure to a professor, even though the college took numerous steps

following that determination (such as failure to renew a one-year "terminal" contract that followed the tenure decision) that confirmed and carried out its allegedly discriminatory decision. The Court rejected claims that acts carrying out prior discriminatory decisions (e.g., the final termination of the plaintiff's employment) extend the limitations period; the Court explained that "'the proper focus is upon the time of the discriminatory acts, not upon the time at which the *consequences* of the acts became most painful.'" *Id.* at 258 (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (1979))(emphasis in original).

Similarly, subsequent predicate acts should not start the RICO clock running again when the only injuries resulting from those subsequent acts are injuries also directly attributable to predicate acts committed outside the limitations period. *See State Farm Mutual*, 828 F.2d at 5 (Kennedy, J., concurring)("A corollary rule [to the separate accrual rule] is that damages may not be recovered for injuries sustained as a result of acts committed outside the limitations period."). In the absence of any evidence that the injuries allegedly sustained by Petitioners as a result of Respondents' latest predicate acts were in any way distinct from the damages that Petitioners could have sought years ago in an earlier RICO action, damages for such injuries are time barred.

III. RESPONDENTS' ALLEGED CONCEALMENT OF THEIR FRAUD DOES NOT WARRANT TOLLING THE STATUTE OF LIMITATIONS

Petitioners also argue that the doctrine of equitable estoppel should be applied to relieve them from the statute

of limitations, because Respondents allegedly took steps to actively conceal their misconduct. Petitioners Brief 45-49.

Petitioners argument is without merit. Petitioners have not alleged any conduct by Respondents that rises to the level of active concealment. While Respondents never admitted to their alleged fraud, they are not alleged to have made "a special effort to cover up the fraud." *Wolin,* 83 F.3d at 852. More importantly, Respondents were simply not in a position to cover up their alleged fraud, because Petitioners had available to them all the materials necessary to determine that the Harvestore silo was not performing as promised.

In any event, Petitioners' civil RICO cause of action would be time-barred, even if equitable estoppel were applied in this case to toll the statute of limitations. Petitioners contend that they were first fully aware of the extent of Respondents' wrongdoing in April 1991 when Klehr and Dr. William Olson looked inside the Harvestore silo. Yet, Petitioners did not file suit until more than two years later, on August 27, 1993. Equity provides an aggrieved plaintiff with only enough additional time to prepare and file his suit after learning the necessary facts; it does not set the clock at zero and give the plaintiff four additional years within which to file suit. *Phillips,* 984 F.2d at 492. Two years and four months was an unreasonable amount of time for Petitioners to delay following the date on which they became fully aware of all relevant facts. Accordingly, equitable estoppel provides no support for Petitioners.

CONCLUSION

Amici curiae Washington Legal Foundation, the Manufacturers Alliance, and the Allied Educational Foundation respectfully request that the Court affirm the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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